Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-390

CITY OF ANNISTON, ALABAMA, et al,
Petitioners

vs.

MACK SCOTT, et al,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

George C. Longshore
COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576

Counsel for Respondents

QUALITY PRESS, INC.,—BIRMINGHAM, AL 35233

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QUESTIONS PRESENTED

1. Whether a municipal corporation may employ non-validated written tests in the course of examining candidates for promotion.

STATEMENT OF THE FACTS

This is a case involving the use of non-validated written tests by a municipality for purposes of promotion to jobs within the Public Works Department.

The devastating effect of the testing was apparent in the segregated job structure in the Public Works Department. Of the twenty-six jobs in Public Works almost 80 percent of the black employees (48 out of 61) were found in the laborer category. See Plaintiff's Exhibit 11 attached hereto. An earnings comparison between whites and blacks further demonstrated that the wage differences that separated the two groups was an average of $186.00 per month. See Plaintiff's Exhibit 12 attached hereto.

Although the Civil Service Board's practice has been to give written tests for promotion, the Board has been willing to appoint or upgrade white employees in the Sanitation Department without examination. On May 23, 1974, the Public Works Director reclassified two white employees to the job of labor foreman who had been performing these duties without being so classified. (P.X. 2-G) On September 25, 1974, a new Equipment Operator III was appointed. When the Sanitation Superintendent's position became vacant, Mr. Mathis was given a temporary appointment. (P.X. 2-J)

Mr. Mathis is a good example of how white employees have risen without being required to take written examinations. Mr. Mathis has since 1968 risen from Equipment Operator I to Equipment Operator II to Labor Foreman to Assistant Superintendent to Superintendent while taking only the hiring examination in 1968. (R. 315-16)

The District Court found, and correctly so, both the segregated nature of the jobs and the large earnings disparity between black and white employees. See Page 21a-22a of the Appendix to the City's Petition.

Although the City is candid enough to agree that the requirement of written testing for promotion prevents black employees from advancing (City's Petition at P. 6) the City did test as late as July of 1975, a date well after the filing of the E.E.O.C. charges and six months after the filing of the lawsuit (R.268).

The City claims that the use of written examinations fell into disuse about the time the lawsuit was filed, but the record evidence fails to show a renunciation of testing:

"Q. (By Mr. Longshore:) Has the Personnel Board — well the Civil Service Board made a determination to stop giving written exams for equipment operator one, two and three?

A. No. You mean to stop giving written examinations?

Q. Uh-huh.

A. No, no decision has been made. We've just from past experience found that it's easier to test the employees with a performance examination and, of course, the rules say that they can give a written, oral or performance examination, whichever they choose, and this seems to work out." (R. 268)

The defense of a bona fide merit system (42 U.S.C.A. §20003-2(h)) was not raised by the pleadings (A.9), the Pre-Trial Order (A.10) nor was it put in issue before the District Court. Neither the District Court's decision nor that of the Court of Appeals makes any mention of a bona fide merit system defense. The issue was raised for the first time in a Petition for Rehearing to the Court of Appeals. "Under these circumstances, we see no cause for derivation from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here." *Neely v. Martin K. Eby Construction Co.*, 380 U.S. 317 (1967). Citing Supreme Court Rule 40(1) (d) (2); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *State of California v. Taylor*, 353 U.S. 553 (1956).

As can be seen from the decisions the case was tried as a testing case with the outcome turning on whether the tests had been validated. The City lost because it had failed to validate its written tests, and because

its efforts to counteract the adverse effect of the testing had proved ineffective.

REASONS FOR DENYING THE WRIT

The Petition should be denied because (1) the Fifth Circuit's opinion is consistent with the authoritative decisions of this Court, (2) there is no split among the Circuits, and (3) the City of Anniston, unlike the defendant in *Washington v. Davis*, 426 U.S. 229 (1976), makes no claim that written testing is necessary or even desirable to qualify or upgrade its personnel. The City stated in its Pre-Trial statement of position that it would no longer employ written tests because "only a small number of the blacks were passing the written examination." (A.11) At trial it indicated a preference for performance tests. (A.124)

The Fifth Circuit's decision is altogether consistent with *Washington v. Davis, supra.* Judge Rubin, speaking for the Fifth Circuit, correctly interpreted *Washington* as distinguishing between the standards applicable to cases brought under the Civil Rights Act of 1964 and those applicable under the Fourteenth Amendment. This distinction has more recently been affirmed in a case against a private employer. *Teamsters v. United States*, 431 U.S. 324 (1977). These cases illustrate that while the purpose of the Fourteenth Amendment is the prevention of official

conduct which discriminates on account of race, the Civil Rights Act of 1964 had as its primary purpose the assurance of equal employment opportunities to individuals or groups. In *Griggs v. Duke Power Co.*, 401 U.S. 429-301, the primary objective of Title VII was said to be:

> ". . . to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

Every circuit court passing on this question has concluded, as did the Fifth Circuit, that Title VII standards for private employers should apply to the government as an employer. *United States v. Chicago,* 537 F.2d 416 (7th Cir. 1978), *Firefighters Institute for Racial Equality v. St. Louis,* 549 F.2d 506 (8th Cir. 1977), *Blake v. Los Angeles,* ___ F.2d ___ (9th Cir. 1979) 19 F.E.P. 1441, and now *Scott v. Anniston,* 597 F.2d 897 (5th Cir. 1979).

Even if the merit system defense be considered it is apparent that the term "merit system" does not embrace the use of written examinations any more than a bona fide seniority system is synonymous with written tests. Obviously, *Griggs v. Duke Power Co., supra,* survived *Teamsters v. United States,* ___ U.S. ___, 97 S.Ct. 1891 (1977). The term "merit system"

appeared in the Civil Rights Act of 1964 (78 Stat. 253) and was not changed by the 1972 amendments. (86 Stat. 103) Although the term is often used to refer to non-patronage public employment systems[1/], its inclusion in the original Act indicates that the term as used in this context does not refer to public employment, but to systems of objective measurement of work performance in non-union plants.

Respectfully submitted,

George C. Longshore
COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576

1/ *Elrod v. Burns,* 427 U.S. 347, 354 (1976).

CERTIFICATE OF SERVICE

I do hereby certify that I have on the day of , 1979, served a copy of the foregoing Brief on counsel for all parties to this proceeding by mailing same, postage prepaid, to:

Richard B. Emerson, Esquire
501 First National Bank Bldg.
Anniston, Alabama 36201

John R. Phillips, Esquire
410 Commercial National Bank Bldg.
Anniston, Alabama 36201

George C. Longshore

EXHIBIT 11
PLAINTIFF'S EXHIBIT:

	TOP SALARY		White	Black
1.	533.00	- Custodial Worker	2	0
2.	561.00	- Clark II	1	0
3.	563.00	- Laborer	30	48
4.	632.00	- Utility Laborer	0	3
5.	729.00	- Electrician I	1	0
6.	786.00	- Equipment Operator I	15	10
7.	842.00	- Engineer Aide I	1	0
		- Equipment Operator II	5	0
8.	897.00	- Electrician II	1	0
		- Equipment Operator III	3	0
		- Cemetary Supervisor	1	0
9.	953.00	- Labor Foreman	4	0
		- Engineer Aide II	1	0
10.	1009.00	- Asst. San. Supt.	1	0
		- Asst. Street Supt.	0	0
		- Auto Mechanic	6	0
		- Garage Supt.	1	0
11.	1065.00	- Chief Elect. Inspector	1	0
		- Chief BLP Inspector	1	0
		- Chief Elctrician	1	0
12.	1122.00	- Street Superintendent	1	0
		- B & G Superintendent	1	0
		- Sanitation Supt.	1	0
13.	1290.00	- Equip. Maintenance Supt.	1	0
14.	1401.00	- Exec. Asst. to City Engineer	1	0
15.	1870.00	- Director of Public Works	1	0
		Total	83	61
			144	

Total Jobs - 26
Whites Represented - 96%
Blacks Represented - 12%

Average Income Based on Top Pay For Job

Whites	-	789.65
Blacks	-	602.95
Discrepancy	-	186.70

7-13-79

EXHIBIT 12
PLAINTIFF'S EXHIBIT:

CURRENT AVERAGE MONTHLY INCOME

Year Employed	White	(No.)	Black	(No.)
1944	$ 876:00	(1)	$	(0)
1945	834.00	(1)		(0)
1946		(0)	581.00	(1)
1949	863.00	(2)		(0)
1951	1297.00	(1)	624.00	(1)
1952	776.00	(1)		(0)
1953	999.00	(1)		(0)
1954	826.00	(1)		(0)
1955	727.00	(1)	727.00	(1)
1957	815.00	(2)		(0)
1959		(0)	674.00	(2)
1960	1057.00	(1)	581.00	(2)
1961		(0)	581.00	(1)
1962	834.00	(1)	581.00	(1)
1963	686.00	(1)		(0)
1964	867.00	(3)		(0)
1965	686.00	(1)	623.00	(3)
1966	728.00	(1)	581.00	(3)
1967	846.00	(4)	594.00	(5)
1968	786.00	(5)	590.00	(7)
1969	759.00	(4)	571.00	(8)
1970	600.00	(2)	561.00	(6)
1971	641.00	(1)	549.00	(5)
1972	656.00	(3)		(0)
1973	626.00	(10)	553.00	(5)
1974	843.00	(4)	534.00	(6)